IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF (PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE TO "DEFENDANTS' JOINT MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF ACTS OR INJURIES OCCURRING BEFORE ANY APPLICABLE LIMITATIONS PERIODS" [Dkt. #2398]

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), hereby submits its response in opposition to Defendants' Joint Motion *in Limine* to Exclude Evidence of Acts or Injuries Occurring Before any Applicable Limitations Periods (Dkt. #2398) ("Defendants' Motion" or "Defs.' Brf.").

I. Introduction

Defendants seek to exclude, pursuant to Federal Rules of Evidence 402 and 403, "evidence of acts or injuries occurring before any applicable limitations periods." (Defs.' Brf. at 1.) Under Defendants' theory, such evidence to be excluded would include the historical condition of the IRW and the historical actions of Defendants. (*Id.* at 2.)

Although the Court dismissed the State's damages claims because of the absence of the Cherokee Nation (Dkt. #2362), Defendants' instant Motion – which argues that "[b]ecause the remaining claims focus on injunctive relief against current activities, this historical evidence is of no continuing relevance" (Defs.' Brf. at 3) – is ill-conceived. Evidence of Defendants' prior

conduct not *only* is relevant to the State's damages claims, as Defendants assert, but it also is directly relevant to the State's RCRA claim and other claims for injunctive relief (regarding, e.g., the scope of the abatement required and the fact that long-term land application of poultry waste has elevated phosphorus levels in the IRW, which will take decades to correct), as well as the State's claim for civil penalties under 27A Okla. Stat. § 2-6-105. Accordingly, Defendants' Motion (Dkt. #2398) should be denied.

II. Argument

A. Defendants' Motion Should Be Denied as Moot.

As a threshold matter, Defendants concede that their Motion is "[c]ontingent upon" the grant of their "Defendants' Joint Motion for Partial Summary Judgment as to [the State's] Time-Barred Claims" (Dkt. #1876) and the outcome of "other pending summary judgment motions," including Defendants' motions for summary judgment on the State's RCRA claim (Dkt. #2050) and the State's state law public nuisance claim (Dkt. #2033).[1] (*See* Defs.' Brf. at 1 & n.2; *see also id*. at 2 ("*In the event that*" the statutes of limitations apply, "Defendants respectfully move . . . to exclude evidence of any acts occurring prior to the limitations periods." (emphasis added)).) Put another way, absent rulings both (1) dispensing with the State's RCRA and state law public nuisance claims *and* (2) limiting the State's private nuisance, federal common law nuisance, trespass, and state statutory claims, Defendants' Motion must be denied.[2]

On August 17, 2009, this Court found as moot Defendants' SOL-related "Motion for Partial Summary Judgment" (Dkt. #1876). *See* Dkt. #2466. On August 13, 2009, the Court also

---

[1] Defendants have not challenged the timeliness of the State's RCRA or state law public nuisance claims — indeed, "RCRA contains no statute of limitations," *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 486 (1996) — but have moved for summary judgment on other grounds.

[2] The reason for this contingency is straightforward; absent any applicable limitations period, there is no basis upon which to exclude "evidence of acts or injuries occurring before any applicable limitations periods." (Defs.' Brf. at 1.)

denied "Defendants' Motion for Summary Judgment on [the State's] RCRA Claim" (Dkt. #2050). *See* Dkt. #2467. And on August 18, 2009, this Court denied in part Defendants' motion for summary judgment (Dkt. #2033) as to the State's state law public nuisance claim. *See* Dkt. #2472. Therefore, the conditions precedent for Defendants' Motion have not been met; the Motion is moot and should be denied.

C. The State's Historical Evidence Should Not Be Excluded

Even if, however, the Court addresses Defendants' Motion as a substantive matter, Defendants' Motion should be denied.

1. Defendants' Fed. R. Evid. 402 Objection

Defendants are correct to acknowledge that "'there is no rule that automatically excludes evidence pre-dating a statute of limitations period' as not relevant under the Federal Rules of Evidence."[3] (Defs.' Brf. at 3 n.4 (quoting *EPA v. City of Green Forest*, 921 F.2d 1394, 1409 (8th Cir. 1990)).) But they are wrong that the State's historical evidence is nonetheless irrelevant here.

At a minimum, such evidence is relevant to the State's RCRA claim. Under 42 U.S.C. § 6972(a)(1)(B), a party may bring a suit against a person "who ***has contributed*** or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." (Emphasis added.) As the Tenth Circuit Court of Appeals has held, RCRA "applies retroactively to past violations, so long as those violations are a present threat to health

[3] Defendants also cite *Hughes v. Reed*, 46 F.2d 435, 442 (10th Cir. 1931), for this proposition. In *Hughes,* the Tenth Circuit in fact held that the special master's exclusion of evidence – based on the theory that nothing that occurred prior to the statutory period was relevant – was manifestly erroneous. *Id.* ("[A]ny evidence tending to prove a wrong within the statutory period is competent, no matter the date of the evidential transaction. In other words, the statute bars recovery, but does not bar evidence.").

or the environment." *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007); *see also United States v. WCI Steel, Inc.*, 72 F. Supp. 2d 810, 831 (N.D. Ohio 1999) ("RCRA encompasses both current and continuing violations, even if the latter originated in activities occurring before the applicable date of the statute."); *K-7 Enters., L.P. v. Jester*, 562 F. Supp. 2d 819, 830-31 (E.D. Tex. 2007) (denying summary judgment and finding that historical evidence of ownership and contamination created genuine issue of fact regarding whether defendants contributed to an imminent and substantial endangerment); *Maine People's Alliance v. Holtrachem Mfg. Co.*, 211 F. Supp. 2d 237, 241, 255 (D. Me. 2002) (defendant's operation of plant from 1967 to 1982 and release of mercury during that time deemed relevant to imminent and substantial endangerment element of RCRA claim).

Therefore, there is no limit to "evidence of historical violations in a RCRA civil penalty action." *See United States ex rel. Tillson v. Lockheed Martin Energy Sys., Inc.*, Nos. 5:00-cv-39, 5:99-cv-170, 2004 WL 2403114, at *19 n.9 (W.D. Ky. Sept. 30, 2004); *see also City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 656 (N.D. Ohio 1993) ("Congress intended to allow citizen suits under section 7002 of RCRA for past violations where the effects of the violation remain remediable" (internal quotation marks omitted)). Moreover, any historical benefit Defendants received from violating RCRA may, for example, "be relevant to an examination of the extent of the violations, the scope of injunctive relief, and [Defendants'] good faith in remedying known violations." *WCI Steel*, 72 F. Supp. 2d at 831.

Here, evidence of Defendants' historical conduct is relevant because, as alleged by the State, such contributions "are a present threat to health or the environment." *Burlington N.*, 505 F.3d at 1021. "[T]he phosphorus affecting water quality problems in the river today may have been land applied two weeks ago or twenty years ago." (Dkt. #2062, Exhibit 107, Phillips

12/19/07 Aff. ¶ 10.) "[I]t is clear that the past application of poultry waste to soils in the watershed has contributed to the historical water quality problems in the watershed. Moreover, these historical applications are also contributing to the current and ongoing degradation in these systems." (*Id.*)

Likewise, because there is no statute of limitations applicable to the State's claims for state law nuisance, federal common law nuisance, and trespass – which remain in the case – Defendants' Motion is nonsensical. It is beyond dispute that the State can use what Defendants might call "historical" evidence to prove these claims. Thus, Defendants' relevance objection is unavailing.

In addition, the State's historical evidence is further relevant to the State's claim for civil penalties in Count 7. In Count 7, the State has brought a claim for, among other things, civil penalties for Defendants' violations of the Oklahoma Environmental Quality Code, 27A Okla. Stat. § 2-6-105. (Dkt. #1215 (Second Amended Complaint ¶ 131).) The remedy provision accompanying 27A Okla. Stat. § 2-6-105, entitled "Violation of Code, order, permit or license or rule – Penalties and remedies," is 27A Okla. Stat. § 2-3-504, which provides in part: "Except as otherwise specifically provided by law, any person who violates any of the provisions of, or who fails to perform any duty imposed by, the Oklahoma Environmental Quality Code . . . : 2. May be punished in civil proceedings in district court by assessment of a civil penalty of not more than Ten Thousand Dollars ($10,000.00) for each violation . . . ." 27A Okla. Stat. § 2-3-504(A). Subsection H of 27A Okla. Stat. § 2-3-504 provides that "[i]n determining the amount of a civil penalty the court shall consider such factors as . . . ***the history of such violations*** . . . ." (Emphasis added.)

Finally, because the State's claim under 27A Okla. Stat. § 2-6-105 (Count 7) survived Defendants' summary judgment challenge, and because such cause of action was first enacted in 1955,[4] Defendants' Motion is particularly ill-advised. Thus, even assuming arguendo that Defendants' theory is correct, the State is entitled to present historical evidence reaching back to 1955.

In short, there is no basis to support a conclusion that the State's historical evidence lacks relevance and should be excluded pursuant to Fed. R. Evid. 402.

2. Defendants' Fed. R. Evid. 403 Objection

In light of the above, Defendants' argument that the State's "historical evidence" "presents minimal, if any, probative value" is not credible. (Defs.' Brf. at 4.) Nor is their argument that any probative value is substantially outweighed by considerations of potential prejudice and undue delay. As Defendants' Rule 403 objection (1) is premised on (non-existent) rulings (a) dispensing with the State's RCRA and state law public nuisance claims *and* (b) limiting the State's private nuisance, federal common law nuisance, trespass, and state statutory claims and (2) wholly ignores the probative value of such evidence as to the State's claims for civil penalties, such objection may quickly be dispensed with. The only prejudice that would be suffered as a result of this evidence would be by the State if it were excluded.

Finally, Defendants argue that the State's historical evidence should be excluded because the State's "reliance on evidence pre-dating the relevant limitations periods is cumulative . . . ." (Defs.' Brf. at 5.) It is puzzling how Defendants can argue that such evidence would be cumulative when they seek to exclude such evidence in its entirety. In any event, the State's historical evidence is not precluded by Rule 403's protection against cumulative evidence. Black's Law Dictionary defines "cumulative evidence" as "[a]dditional evidence that supports a

[4] *See* 1955 Okla. Sess. Laws, p. 478 (Dkt. #1917-2, p. 5).

fact ***established by the existing evidence*** (esp. that which does not need further support)." Black's Law Dictionary (8th ed. 2004) (emphasis added). Defendants provide no explanation whatsoever as to how evidence from one time period would be cumulative to another period to establish the same point. The only way that such evidence could be regarded as cumulative would be if Defendants were in fact stipulating that it was already established that their earlier actions were continuing to pollute the IRW. They, of course, have not so stipulated.

The authorities Defendants cite for their cumulative argument lend them no support. As an initial matter, neither case addressed the use of evidence pre-dating the relevant limitations period. In addition, Defendants quote out of context language from *United States v. Williams*, 81 F.3d 1434, 1443 (7th Cir. 1996), for a purported definition of "cumulative." (Defs.' Brf. at 5.) In *Williams*, the district court, with regard to evidence of prisoner witnesses being assigned to an "open unit" of a jail, where they could mingle for 16 hours each day, deemed such evidence to be cumulative to evidence of their being able to mingle for one hour each day. *Id.* at 1443. The premise of the district court's "cumulative" finding was the fact that the evidence went to prove the same point, i.e., whether the witnesses had an opportunity to coordinate their testimony. In contrast, here, the State's historical evidence is not cumulative to other evidence to prove the same point – and Defendants do not identify any evidence that serves to prove the same point. (In any event, on appeal, the Seventh Circuit Court of Appeals held that such evidence should have been admitted. *Id.*)

Moreover, Defendants' reliance on *Tioga Public School District #15 v. United States Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993), a products liability case, is misplaced. In *Tioga Public School District*, the court deemed additional documents showing the use of asbestos in building construction at the time the relevant school buildings were constructed to be cumulative

because the party proffering such documents "already had presented considerable evidence regarding the widespread use of asbestos-containing building materials during the period when the schools at issue in this case were built." *Id.* at 923. Such evidence served to prove the same point and was therefore deemed cumulative. Such is not the case here.

In sum, Defendants' Rule 403 objection is without merit.

III. Conclusion

For the foregoing reasons, the Court should deny Defendants' Motion *in Limine* (Dkt. #2398).

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
ASSISTANT ATTORNEY GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
David P. Page OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

/s/ Ingrid L. Moll
William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice)*
MOTLEY RICE LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1678

Louis W. Bullock OBA #1305
Robert M. Blakemore OBA 18656
BULLOCK, BULLOCK & BLAKEMORE
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

Frederick C. Baker
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

Jonathan D. Orent
(admitted *pro hac vice)*
Michael G. Rousseau
(admitted *pro hac vice)*
Fidelma L. Fitzpatrick
(admitted *pro hac vice)*
MOTLEY RICE LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	
Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	
Frederick C. Baker	fbaker@motleyrice.com
Elizabeth C. Ward	lward@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
MOTLEY RICE LLC	
Counsel for State of Oklahoma	
Robert P. Redemann	rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.	
David C. Senger	david@cgmlawok.com
Robert E Sanders	rsanders@youngwilliams.com
Edwin Stephen Williams	steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.	
Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.	

John H. Tucker	jtucker@rhodesokla.com
Theresa Noble Hill	thill@rhodesokla.com
Colin Hampton Tucker	ctucker@rhodesokla.com
Kerry R. Lewis	klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	
Terry Wayen West	terry@thewestlawfirm.com
THE WEST LAW FIRM	
Delmar R. Ehrich	dehrich@faegre.com
Bruce Jones	bjones@faegre.com
Krisann C. Kleibacker Lee	kklee@faegre.com
Todd P. Walker	twalker@faegre.com
Christopher H. Dolan	cdolan@faegre.com
Melissa C. Collins	mcollins@faegre.com
Colin C. Deihl	cdeihl@faegre.com
Randall E. Kahnke	rkahnke@faegre.com
FAEGRE & BENSON, LLP	
Counsel for Cargill, Inc. & Cargill Turkey Production, LLC	
James Martin Graves	jgraves@bassettlawfirm.com
Gary V Weeks	gweeks@bassettlawfirm.com
Woody Bassett	wbassett@bassettlawfirm.com
K. C. Dupps Tucker	kctucker@bassettlawfirm.com
Earl Lee “Buddy” Chadick	bchadick@bassettlawfirm.com
Vincent O. Chadick	vchadick@bassettlawfirm.com
BASSETT LAW FIRM	
George W. Owens	gwo@owenslawfirmpc.com
Randall E. Rose	rer@owenslawfirmpc.com
OWENS LAW FIRM, P.C.	
Counsel for George’s Inc. & George’s Farms, Inc.	
A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com
Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	
Sherry P. Bartley	sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	
Counsel for Peterson Farms, Inc.	

John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	
Counsel for Simmons Foods, Inc.	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Thomas C. Green	tcgreen@sidley.com
Gordon D. Todd	gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP	
Robert W. George	robert.george@tyson.com
L. Bryan Burns	bryan.burns@tyson.com
Timothy T. Jones	tim.jones@tyson.com
TYSON FOODS, INC	
Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.com
Dustin R. Darst	dustin.darst@kutakrock.com
KUTAK ROCK, LLP	
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.	
R. Thomas Lay	rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES	
Frank M. Evans, III	fevans@lathropgage.com
Jennifer Stockton Griffin	jgriffin@lathropgage.com
David Gregory Brown	
LATHROP & GAGE LC	
Counsel for Willow Brook Foods, Inc.	
Robin S Conrad	rconrad@uschamber.com

NATIONAL CHAMBER LITIGATION CENTER	
Gary S Chilton	gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC	
Counsel for US Chamber of Commerce and American Tort Reform Association	
D. Kenyon Williams, Jr.	kwilliams@hallestill.com
Michael D. Graves	mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON	
Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.	
Richard Ford	richard.ford@crowedunlevy.com
LeAnne Burnett	leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY	
Counsel for Oklahoma Farm Bureau, Inc.	
Kendra Akin Jones, Assistant Attorney General	Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General	Charles.Moulton@arkansasag.gov
Counsel for State of Arkansas and Arkansas National Resources Commission	
Mark Richard Mullins	richard.mullins@mcafeetaft.com
MCAFEE & TAFT	
Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen	
Mia Vahlberg	mvahlberg@gablelaw.com
GABLE GOTWALS	
James T. Banks	jtbanks@hhlaw.com
Adam J. Siegel	ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP	
Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation	
John D. Russell	jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC	
William A. Waddell, Jr.	waddell@fec.net

David E. Choate	dchoate@fec.net
FRIDAY, ELDREDGE & CLARK, LLP	
Counsel for Arkansas Farm Bureau Federation	
Barry Greg Reynolds	reynolds@titushillis.com
Jessica E. Rainey	jrainey@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON	
Nikaa Baugh Jordan	njordan@lightfootlaw.com
William S. Cox, III	wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC	
Counsel for American Farm Bureau and National Cattlemen's Beef Association	
Duane L. Berlin	dberlin@levberlin.com
LEV & BERLIN PC	
Counsel for Council of American Survey Research Organizations & American Association for Public Opinion Research	

Also on this 20th day of August, 2009, I mailed a copy of the above and foregoing pleading to:

Thomas C Green -- via email: tcgreen@sidley.com
Sidley, Austin, Brown & Wood LLP

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

Steven B. Randall
58185 County Rd 658
Kansas, Ok 74347

Cary Silverman -- via email: csilverman@shb.com
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)

/s/ Ingrid L. Moll
Ingrid L. Moll